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IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*
Petitioners,

v.

STATE OF OREGON, DEPARTMENT OF TRANSPORTATION, *ET AL.*
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a flat fee imposed by the State of Oregon upon commercial vehicles conducting interstate operations violates the Commerce Clause of the United States Constitution.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy and in every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus* briefs in cases involving issues of national concern to American business. The Chamber has participated as *amicus curiae* in several hundred cases before this Court.

The Chamber and its members have a strong interest in this case because the decision of the Oregon Supreme Court is inconsistent with the core constitutional principle of free trade among the states. The federal Constitution was drafted to replace the Articles of Confederation largely to advance that principle, and it is critical to the conduct of American business that the United States remain a free trade zone. As this Court has emphasized, the Commerce Clause "was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. Seelig*, 294 U.S. 511, 523 (1935).

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[1] Counsel for the parties have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Most heavy trucks using Oregon's highways pay a "weight-mile tax" based on the weight of the truck and the number of miles it travels in Oregon. This common form of highway tax does not discriminate against interstate commerce because interstate truckers that use Oregon's highways less than local truckers pay a proportionately smaller tax. A flat tax on truckers, in contrast, would impose the same fee on both interstate and strictly intrastate operators. Flat taxes violate this Court's requirement of "internal consistency" because if multiple states were to adopt such taxes, interstate truckers would pay much more in taxes per mile driven than trucks operating in a single state. *See American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 296 (1987) (holding that Pennsylvania's flat tax on truckers violated the Commerce Clause).

The present case arises from Oregon's provision that carriers hauling logs, sand and gravel, and woods chips may elect to pay a flat tax instead of a weight-mile tax. Although carriers must select the option annually and apply it to their entire fleet, carriers providing primarily in-state services will generally benefit because their flat tax payments will often be less than their weight-mile payments would be. Indeed, the evidence below showed that the flat tax option confers a substantial competitive advantage: sand and gravel carriers electing the flat tax option save on average 1.34 cents per mile and log carriers save on average 1.9 cents per mile compared to competitors paying weight-mile taxes. Pet. App. 26a. Because the average profit margin for truckers is about 3 cents per mile, those tax savings are significant. *See id.*

Not surprisingly, the evidence also showed that Oregon-based carriers were far more likely to take advantage of the tax savings provided by the flat tax option. Less than one-quarter of one percent of carriers based out of state that used Oregon's highways paid the flat tax. Pet. 4. Carriers based in Oregon, in contrast, were fifty times more likely to elect the flat tax option. *See id.*

The Oregon Court of Appeals, relying primarily on *Scheiner*, concluded that the structure of the flat tax and the evidence described above rendered it invalid. The court wrote that Oregon's approach "discriminate[s] between interstate and intrastate carriers whose businesses differ only because of their relationship to state boundaries, and the discrimination operates to the detriment of the interstate carrier." Pet. App. 34a. According to the court, Oregon's flat tax plainly fails the internal consistency test and therefore exerts pressure on interstate carriers to change their operations to focus on intrastate business. *See id.* at 33a-34a.

The Oregon Supreme Court reversed, relying in part on this Court's decision in *American Trucking Ass'ns, Inc. v. Michigan Public Service Comm'n*, 125 S. Ct. 2419 (2005). In the Michigan case, this Court upheld a $100 annual fee on truckers transporting goods within Michigan. Although that fee appears similar to a flat tax, interstate carriers operating in Michigan could avoid the $100 fee and obtain a permit for $10 authorizing them to carry intrastate loads for 72 hours, and no evidence showed that interstate truckers seeking to "top off" their loads suffered in light of that option. *Id.* at 2424. In addition, although the Court recognized that an interstate trucker might have to pay multiple fees if other states adopted Michigan's approach, it emphasized that the

carrier would have to do so only because it engaged in purely "*local* business" in those states. *See id.* at 2425.

REASONS FOR GRANTING THE PETITION

After this Court's decision in *Scheiner*, many states acknowledged that their flat highway taxes were unconstitutional. The decision below, however, has provided a roadmap for state legislatures and courts to circumvent the Constitution by merely recasting protectionist measures as "locally focused flat fees." Pet. App. at 21a-22a. The unfortunate consequence, if the decision below stands, is likely to be a new round of protectionist flat tax legislation. To avoid this result and its attendant effects on interstate commerce, this Court should grant certiorari to review the Oregon decision.

Significantly, under the lower court's approach, Pennsylvania could effectively re-enact the flat tax struck down in *Scheiner* by presenting it—like the tax at issue here—as an elective alternative to a weight-mileage tax affecting primarily intrastate commerce. It would be a simple matter to design the flat tax as an "option" that few interstate carriers could take advantage of while, as in Oregon, many intrastate operators would obtain a tax benefit. As this Court explained in *Scheiner*, however, that result would undermine the purpose of the Commerce Clause by providing an incentive to offer local rather than interstate service.

The court below purported to follow this Court's decision *Michigan Public Service Comm'n*. But nothing in *Michigan Public Service Comm'n* changed this Court's approach to the kinds of taxes at issue in *Scheiner*. To the contrary, as further set forth below, that case is readily distinguishable because the challenged tax applied only to *intrastate* commerce,

because carriers could avoid the fee by obtaining a $10 permit good for 72 hours, and because the tax was intended to defray administrative costs likely to vary per truck or per carrier rather than per mile traveled. *See* 125 S. Ct. at 2423-2425.

In short, the lower court's misunderstanding of *Scheiner* and of the line between *Scheiner* and *Michigan Public Service Comm'n* threatens to undermine this Court's Commerce Clause jurisprudence and encourages other states to enact and uphold similarly discriminatory laws. This Court should grant the petition and clarify that a tax that fails the internal consistency test violates the Commerce Clause unless it applies to entirely local commerce and the evidence provides no reason to think that the tax penalizes interstate commerce.

1. The lower court's treatment of *Scheiner* effectively renders it a dead letter. As noted above, the result is that under the Oregon court's approach states could enact *Scheiner*-style flat taxes simply by casting them as optional, "locally focused" alternatives to weight-mileage taxes. This Court should not wait for other states to follow Oregon's lead, but should act now to reaffirm *Scheiner*.

In *Scheiner*, this Court confronted a pair of taxes imposed by Pennsylvania on trucks using its roads. The first, a "marker fee," was imposed only on out-of-state vehicles. For in-state trucks, the state's registration fee was deemed to include that payment. *See Scheiner*, 483 U.S. at 273-274. The second fee was an "axle tax," a flat tax that varied from $72 to $180 per vehicle depending on the number of axles. *Id.* at 274. Trucks that traveled less than 2,000 miles inside of Pennsylvania were eligible for a proportional rebate on

their axle tax, and truckers could avoid paying the axle tax by paying $25 for a permit valid for five days. *Id.*

The *Scheiner* Court held that both fees violated the Commerce Clause. "[U]napportioned flat taxes . . . penalize some travel within the free trade area" protected by the Commerce Clause. *Id.* at 284. The Court explained that if other states were to pass a similar tax, interstate carriers would clearly suffer a substantial competitive disadvantage compared to exclusively in-state operators. *See id.* The total amount that a carrier would pay would depend not on how many miles the carrier traveled or the cost to the states (in wear and tear and other resources used) of the carrier's activities, but rather simply upon how many states the carrier traveled through. In other words, as the *Scheiner* Court noted, the challenged fees bore "'much more heavily in the aggregate on a firm that sells in many places than on a firm otherwise identical . . . that sells in only one place.'" *Id.* at 287 n.20, quoting Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1188 (1986). The Court concluded that such flat taxes have "a forbidden impact on interstate commerce because [they] exert[] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Scheiner*, 483 U.S. at 286-287.

Significantly, while the practical effect of flat taxes is that in-state carriers *generally* pay a lower per-mile tax than out-of-state carriers, that need not be categorically true for a flat tax to pose an unconstitutional burden on interstate commerce. In *Scheiner* itself, the Court acknowledged that some out-of-state carriers accruing very high mileage in Pennsylvania paid a lower per-mile tax than some in-state

carriers, but dismissed that fact as unimportant.[2] The constitutional problem with the challenged taxes was their tendency to encourage carriers to accrue miles in a single state where they had paid the flat tax rather than to travel across state lines. *See id.* at 286-287.

Nothing in this Court's decision in *Michigan Public Service Comm'n* overruled, limited, or even hinted at criticism of *Scheiner*. The later case held only that the fee on local commerce at issue there had so little in common with the flat taxes prohibited under *Scheiner* that *Scheiner*'s rule did not reach them.

The Michigan case involved a $100 tax imposed on trucks engaging in strictly intrastate commercial operations—trucks undertaking point-to-point hauls within the State. *See Michigan Public Service Comm'n*, 125 S. Ct. at 2422. As noted above, a carrier could avoid the fee by paying $10 for a permit valid for 72 hours. *See id.* at 2424. In upholding the tax against a Commerce Clause challenge, the Court emphasized that the tax applied *only to intrastate commerce*. *See id.* at 2423-2425. The Court also pointed out that the tax did not fund road maintenance, but rather was designed to defray costs associated with regulating vehicle size and weight, administering insurance requirements, and applying safety standards. Such costs, the Court noted, may be more likely to vary per truck or per carrier than per mile traveled.

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[2] That local interests are the primary beneficiaries of much legislation that runs afoul of the dormant Commerce Clause should not be surprising. Nor should it be surprising when they are not the exclusive beneficiaries, given that a facially discriminatory tax against out-of-state interests stands little chance of being upheld by any court.

Id. at 2424. Finally, the Court observed that the costs associated with changing the tax assessment mechanism from a flat fee to a per-mile charge (the preferred option of those challenging the tax) would be so large that "the game [would be] unlikely to be worth the candle." *Id.* Under all of these circumstances, the Court was unwilling to hypothesize that a purely local tax would hinder interstate commerce absent evidence of such an effect.

The court below ignored these critical aspects of *Michigan Public Service Comm'n* in upholding the flat tax at issue here. According to the lower court, the Michigan case stands for the proposition that "locally focused flat fees" should not be presumed to have a discriminatory effect on interstate commerce. Pet. App. at 21a-22a. That is a misreading of *Michigan Public Service Comm'n*. In that case, the "local focus" of the tax upon which the Court relied was the fact that the *entire* transaction being taxed, in *every transaction* being taxed, was an intrastate transaction. Put another way, the tax in *Michigan Public Service Comm'n* did not apply to the in-state portion of *any* interstate commerce, but rather applied only to entirely separate transactions occurring entirely within the boundaries of a single state. The *Michigan* Court put this point straightfowardly: the Michigan fee "taxes purely local activity; it does not tax ... transactions spanning multiple States." *Michigan Public Service Comm'n*, 125 S. Ct. at 2425.

The Oregon Supreme Court's conception of "locally focused" is very different. In the present case, the tax is locally focused only insofar as it "is aimed at operations that take place primarily in Oregon." Pet. App. 18a. In other words, the Oregon tax applies to certain trucks driving on the State's roads, and it so happens that many of those trucks are

engaged in primarily intrastate commerce. But that, of course, is virtually *always* true of taxes that states apply to trucking enterprises—the taxes apply to trucks wishing to use the states' roads, and many truckers on those roads are engaged in intrastate commerce.[3] Plainly, that is not enough to immunize such taxes from constitutional scrutiny under *Scheiner* and this Court's subsequent dormant Commerce Clause cases, including *Michigan Public Service Comm'n*.[4]

The other factors upon which this Court relied in upholding the Michigan tax are also absent from this case. There is no indication, for example, that the Oregon taxes were designed to cover expenses such as vehicle safety regulation that would make a per-vehicle charge reasonable; rather the tax appears to be a use tax. *See* Pet. App. 24a-25a, citing Or. Rev. Stat. § 825.486 (paying the flat tax or the

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[3] Notably, however, the Oregon Supreme Court's own opinion acknowledges that the flat tax here applies to some *inter*state commerce. Pet. App. 1a. The court accorded that fact no significance, however, notwithstanding that this Court held it constitutionally significant in differentiating between the Michigan and the Pennsylvania taxes. *See Michigan Public Service Comm'n*, 125 S. Ct. at 2423; *see also supra* at 7-8.

[4] That the court below has not properly reconciled *Scheiner* and *Michigan Public Service Comm'n* is further evidenced by its assertion that adopting petitioner's view in this case would require the invalidation of all local taxes. *See* Pet. App. 22a. This Court in *Scheiner*, while invalidating a flat tax similar to the one in this case, noted that certain local flat taxes could be proper. *See Scheiner*, 483 U.S. at 296 & n.26. Indeed, *Michigan Public Service Comm'n* itself *upheld* a flat tax while stating that it was applying the rule from *Scheiner*. *See Michigan Public Service Comm'n*, 125 S. Ct. at 2423.

weight-mile tax in Oregon exempts the truck from having to pay any fuel tax, a classic use tax). Likewise, this is not a flat tax as to which replacement with a per-mile tax would create an administrative burden such that the "game would not be worth the candle." On the contrary, the flat tax in Oregon does not reduce any administrative burden appreciably, as all carriers are required to report their Oregon mileage regardless of which tax they elect to pay. *See* Pet. App. 5a.[5] In short, the Oregon tax is not analogous to the sort of flat administrative fee approved in *Michigan Public Service Comm'n*.

The lower court did attempt to distinguish this case from *Scheiner* by asserting that in *Scheiner* there was more evidence of discrimination against interstate commerce in the record. The court chided the plaintiffs for relying on evidence of the aggregate savings realized under the flat fee option, and for "not break[ing] those figures down between in-state and out-of-state trucking operations, or otherwise show[ing] how the aggregate savings serve to set the two groups apart." Pet. App. 21a.

In fact, however, the evidence sufficient to invalidate the tax in *Scheiner* was no more developed than the evidence here. In both cases, the evidence showed that the amounts at

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[5] Admittedly, the flat tax results in some administrative savings. The trial court found that many flat-tax filers took their duties casually and misreported their mileage. *See, for example*, Pet. App. 45a ("[M]ost [flat-tax mileage reports] were clearly inaccurate."). Second, Oregon does not audit flat tax mileage reports. *See* Pet. App. 5a. That the State ignores rampant misreporting that calls into question the reliability of its data about the benefits obtained by flat-tax filers should not help sustain the tax.

issue were significant and that the tendency of the tax was to encourage intrastate rather than interstate commerce. In this case, the former point cannot be disputed—in a business with profit margins of 3 cents per mile, savings of 1.34 to 1.9 cents per mile are significant. *See* Pet. App. 26a. And petitioners here, as in *Scheiner*, showed that "the flat tax "exert[s] pressure on the interstate carrier to change its operations to focus on intrastate business." Pet. App. 33a. *Compare Scheiner*, 483 U.S. at 286 (a flat tax, by its nature, "exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure"). Since the tax in *Scheiner* was not—unlike in the Michigan case—limited to purely *intra*state commerce, that was enough to show that the tax was unconstitutional. The same is true here.

In sum, the decision below points the way for states to enact new flat tax laws on interstate commerce and suggests to courts that such taxes can be upheld notwithstanding their inherently discriminatory nature as long as they are described as "locally focused." Indeed, by following the blueprint laid out in the decision below, Pennsylvania could re-enact the tax invalidated in *Scheiner* with only modest semantic changes.[6] Powerful local interests in other states are likely to seek similar protective legislation. This Court should take the

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[6] Pennsylvania's tax was a flat tax with a per-mile rebate, while the Oregon tax is a per-mile tax with a flat tax option. In order to rewrite the tax, Pennsylvania would simply need to change the axle tax to a per-mile per-axle tax and replace the rebate for carriers traveling under 2000 miles with an "optional flat tax" with a break-even point set at 2000 miles. Revenue from the tax, as well as the administrative costs of the tax, would be identical under the "new" scheme.

opportunity now to clarify that flat taxes, while appropriate in limited circumstances, must not discriminate against interstate commerce.

2. The question presented in the Petition is one of great significance to American business. Legal and regulatory uncertainty present substantial obstacles to prudent business decision-making. The Oregon Supreme Court's decision, which conflicts with the decisions of other federal circuit courts and state courts of last resort to have considered the constitutionality of similar taxes, *see* Pet. 14-17, 26-27, invites local interests to press for similar discriminatory taxes elsewhere. Such legislation imposes a host of costs on businesses that engage in interstate commerce—the direct costs of the discriminatory tax are only the most obvious. The litigation that will inevitably follow, and any adverse decisions that may result, will also be costly to such businesses. And the decision below—by imposing a seemingly insuperable evidentiary burden on plaintiffs—ensures that challenging such legislation will be difficult indeed.

Notably, however, businesses that engage only in intrastrate commerce will avoid these costs as well, further heightening the economic discrimination imposed by the taxes. Likewise, the local interests privileged by the flat tax's discriminatory effect need not concern themselves with the uncertainty created by such a tax. If the courts strike it down, the local interests lose only an artificial competitive advantage over outsiders. The reverse is true for interstate businesses: no state attorney general will challenge these discriminatory tax laws for them, and they must weigh the possibility of an unfavorable decision when considering where to do business.

In short, the decision of the court below tips the playing field unfairly toward in-state companies. This Court can reaffirm existing law and remove this cloud over competition by granting the Petition and reversing the Oregon Supreme Court's decision.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted.

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